

FEDERAL COURT OF AUSTRALIA

Le v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA

397

MIGRATION – partner (Provisional) (Class UF) visa – application for review of decision of Migration Review Tribunal affirming delegate’s decision to refuse visa – whether Tribunal failed to give proper notice of letters and photographs forwarded by third party contesting genuineness of marriage – whether Tribunal decision based on fact which did not exist

Migration Act 1958 (Cth) ss 338(5), 347(2)(b), 359A

Migration Regulations reg 1.15A, Sch 2 cl 309, Sch 2 cl 309.211

Dhillon v Minister for Immigration, Local Government and Ethnic Affairs (1989) 17 ALD 552 cited

**TRAN DIEP THUY LE v MINISTER FOR IMMIGRATION & MULTICULTURAL &
INDIGENOUS AFFAIRS
WAD 237 of 2003**

**NICHOLSON J
13 APRIL 2005
PERTH**

**IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY**

WAD 237 OF 2003

**BETWEEN: TRAN DIEP THUY LE
 APPLICANT**

**AND: MINISTER FOR IMMIGRATION & MULTICULTURAL &
 INDIGENOUS AFFAIRS
 RESPONDENT**

JUDGE: NICHOLSON J

DATE OF ORDER: 13 APRIL 2005

WHERE MADE: PERTH

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The applicant pay the respondent's costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

**IN THE FEDERAL COURT OF AUSTRALIA
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WAD 237 OF 2003

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 APPLICANT**

**AND: MINISTER FOR IMMIGRATION & MULTICULTURAL &
 INDIGENOUS AFFAIRS
 RESPONDENT**

JUDGE: NICHOLSON J

DATE: 13 APRIL 2005

PLACE: PERTH

REASONS FOR JUDGMENT

- 1 The applicant seeks review of a decision of the Migration Review Tribunal ('the Tribunal') made on 12 November 2003. The Tribunal affirmed the decision under review, namely, a decision by a delegate of the respondent made on 3 January 2002. The delegate decided that the visa applicant was not entitled to the grant of a Partner (Provisional) (Class UF) visa. The 'visa applicant' referred to in that decision is Ma Nhu Thuy, the husband of the present applicant who is his sponsor and his wife.
- 2 The visa applicant is a national of Vietnam. He applied for his visa on 31 October 2001. He and the applicant had been married in Vietnam on either 3 August 2001 (the date of their marriage certificate) or in October 2001 (the date of the ceremony).
- 3 Prior to the decision of the delegate on 31 December 2001, two letters had been sent to the Department of Immigration by a third party. One was dated 8 March 2001 and the other 17 October 2001. They were not referred to in the reasons for decision of the delegate.
- 4 Prior to the hearing of the Tribunal, the Tribunal gave a notice dated 10 June 2003 in the following form to the applicant in respect of those letters and what was said to be supporting photographs:

'Section 359A of the Act states that the Tribunal must explain, and invite

comment on, 'particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review'.

You are invited to comment, in writing, on the following information:

- *The Tribunal currently has before it two letters, sent by a third party, in which it is alleged that you are not in a genuine spousal relationship with the visa applicant. These letters state that you are actually in a relationship with the visa applicant's brother and that the marriage has been contrived for the purposes of migration to Australia. It is further alleged that the visa applicant's brother has also contrived a false marriage to your cousin for the same purpose.*
- *Evidence has also been provided in support of these claims. This evidence consists of photographs of you in affectionate poses with both brothers.*

This information is relevant to the review because it may contribute to a finding that you and the visa applicant are not in a genuine and continuing spousal relationship. Should this be the case the visa applicant will not be considered eligible for the grant of a Partner (Provisional) (Class UF) visa.'

- 5 A request was made on behalf of the applicant to the Tribunal for copies of the letters or the photographs, but this was declined. Solicitors on behalf of the applicant wrote on 30 June 2003 denying the applicant was in a relationship with the brother of the visa applicant; denying the marriage between the visa applicant and the applicant was contrived; and explaining the existence of photographs which may show the applicant in affectionate poses with the visa applicant's brother.
- 6 In September 2002, the Tribunal requested evidence from the applicant that she and her husband, the visa applicant, were in a genuine continuing relationship. Documents were provided in response in October 2002. Those documents, including telephone records, records of funds transfers, photographs and correspondence in Vietnamese were provided to the Tribunal. Further material was provided on 6 November 2002. A hearing occurred before the Tribunal on 4 December 2002.
- 7 Although the visa applicant had been the applicant before the delegate, the application for review in the Tribunal was brought by the present applicant as the sponsor of the visa applicant: see s 347(2)(b) and s 338(5) of the *Migration Act 1958* (Cth) ('the Act'). As the application was made in March 2002 it did not come under the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth).

RELEVANT CRITERIA

- 8 The criteria for the grant of visa are found in Sch 2 cl 309 of the Migration Regulations. Relevantly, they include in cl 309.211 as a criterion to be met at the time of the application:

- ‘(1) The applicant meets the requirements of subclause (2) or (3).*
- (2) The applicant meets the requirements of this subclause if the applicant is the spouse of:*
 - (a) an Australian citizen ...’*

- 9 The criteria required the Tribunal to consider the definition of *spouse* in regulation 1.15A, the relevant parts of which are:

- ‘(1) For the purposes of these Regulations, a person is the spouse of another person if the 2 persons are:*
 - (a) in a married relationship, as described in subregulation (1A);*
or
 - (b) in a de facto relationship, as described in subregulation (2).*
- (1A) Persons are in a married relationship if:*
 - (a) they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and*
 - (b) the Minister is satisfied that:*
 - (i) they have a mutual commitment to a share life as husband and wife to the exclusion of all others; and*
 - (ii) the relationship between them is genuine and continuing; and*
 - (iii) they:*
 - (A) live together; or*
 - (B) do not live separately and apart on a permanent basis.*
- (2) ...*
- (3) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for: ...*
 - (ae) a Partner (Provisional) (Class UF) visa; ...*
the Minister must have regard to all of the circumstances of the relationship, including, in particular:
 - (a) the financial aspects of the relationship, including:*
 - (i) any joint ownership of real estate or other major assets;*
and
 - (ii) any joint liabilities; and*
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments;*
and
 - (iv) whether one party to the relationship owes any legal obligation in respect of the other; and*
 - (v) the basis of any sharing of day-to-day household expenses;*
 - (b) the nature of the household, including:*
 - (i) any joint responsibility for care and support of children,*

- if any; and*
- (ii) the parties' living arrangements; and*
- (iii) any sharing of responsibility for housework;*
- (c) the social aspects of the relationship, including:*
 - (i) whether the persons represent themselves to other people as being married or in a de facto relationship with each other;*
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
 - (iii) any basis on which the persons plan and undertake joint social activities;*
- (d) the nature of the persons' commitment to each other, including:*
 - (i) the duration of the relationship; and*
 - (ii) the length of time during which the persons have lived together; and*
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) whether the persons see the relationship as a long-term one.'*

TRIBUNAL'S REASONING

10 The Tribunal's reasons, after preliminaries, commenced by setting out the evidence which was before it. That recitation of evidence included the following two paragraphs:

- '13. On 26 November 1997 the sponsor returned to Vietnam for a holiday. The visa applicant claimed at his interview that the sponsor and his brother, Que Giai Ma, travelled together to Vietnam on this trip. However, the movement records for Que Giai Ma indicate that he has not departed Australia since 14 February 1997. The review applicant said that she travelled to Vietnam at the end of 1997 and that she did not know the visa applicant's brother at this time.*
- ...*
- 21. On 16 December 1999 the sponsor travelled to Vietnam with the visa applicant's brother. However, once again the movement records for Que Giai Ma indicate that he has not departed Australia since 14 February 1997. On this trip the sponsor met the visa applicant's parents for the first time. The couple travelled throughout Vietnam together. The couple did not get married at this time as a fortune-teller told them that it was not a good date to get married. The couple then chose to get married on 31 October 2001. The sponsor returned to Australia on 10 February 2000.'*

The recitation of evidence also included the following:

- '24. The Department received a letter dated 8 March 2001 and photographs from a third party, who requested that the letter be kept confidential. The letter was written in Vietnamese and has been translated by the Tribunal. The letter alleged that the marriage between the couple was fraudulent. The third party claims that the*

sponsor is in love with the visa applicant's brother; Que Giai Ma. Mr Que Giai Ma lives in Perth. Further, it is claimed that the sponsor and Mr Que Giai Ma have postponed their marriage so that the sponsor can marry and arrange sponsorship for the visa applicant. Meanwhile Mr Que Giai Ma will marry and sponsor the sponsor's cousin. The letter provides the names, birthdates and addresses of the parties involved and photographs of the sponsor and Mr Que Giai Ma together.

- ...
28. *The Department received a letter dated 19 October 2001 and photographs from a third party, who requested that the letter be kept confidential. The letter was written in Vietnamese and has been translated by the Tribunal. It purports to be written by the same person who wrote the letter dated 8 March 2001. Once again the third party claims that the couple's marriage is a sham due to the sponsor's love for the visa applicant's brother.'*

- 11 The recitation of evidence also included a paragraph referring to the reasons of the delegate and reading in part as follows:

- '32. *On 31 December 2001 the delegate stated that the visa was not granted on the basis that the visa applicant was not the spouse of the review applicant within the meaning set out in regulation 1.15A. Accordingly, the visa applicant failed to meet regulation 309.221. In reaching that conclusion, the delegate addressed a number of concerns and stated:*

You gave false and misleading information in your last migration application. You stated that your sponsor had not travelled to Vietnam with your brother in 1997.

...
I accept that you have now been open about the relationship between your brother and the cousin of your sponsor. Nevertheless the provision of false and misleading information ... does reflect negatively on any subsequent applications. You and your sponsor ... gave inconsistent information regarding the inception of your relationship.

...'

- 12 Paragraph 38 of the Tribunal's reasons returned to the question of the two letters and recited that in January 2003 the Tribunal had requested a translation of the two third party letters and had received that on 13 March 2003 from a NAATI accredited translator. Paragraph 39 recited the giving of the s 359A notice by the Tribunal to the applicant concerning the letters and photographs. Paragraph 42 referred to the fact that on 14 July 2003 a Tribunal officer had advised the agent that the third party letters and photographs would not be provided to him as they had been provided to the Department on a confidential basis.

13 Turning to its findings, the Tribunal set out the applicable provisions in relation to the visa being sought.

14 The Tribunal then found that the applicant and the visa applicant were married to each other under a marriage recognised as valid in Vietnam and for the purposes of the Act.

15 On the issue of whether their relationship was genuine and continuing, the Tribunal noted in par 61 that this was the visa applicant's third attempt to enter Australia and also that there were two letters containing adverse information on the Department's file. It said these letters were from the same third party and both alleged that the couple's relationship was fraudulent. In relation to the effect of the letters, the Tribunal then continued as follows:

'62. *In response to the adverse information contained in the third party letters, the review applicant has denied the truth of the contents of the letters. The Tribunal notes that the review applicant has not had the benefit of reading the letters and looking at the photographs.*

63. *Given the detailed contents of the letters from the third party, including photographs of the review applicant and the visa applicant's brother together, the Tribunal is inclined to place some weight, on the truthfulness of the letters. This is particularly where the review applicant and the visa applicant's brother have studied together and travelled to Vietnam together. The date of such travel together is unclear, although the weight of evidence tends to support the joint visit taking place at the end of 1999. The visa applicant said at his interview with the Department that the review applicant and the visa applicant's brother travelled to Vietnam together in November 1997. However, the review applicant and the letter from the third party both claim that the review applicant and the visa applicant's brother travelled to Vietnam in 1999.*

64. *The visa applicant denied that the review applicant and the visa applicant's brother had travelled together to Vietnam in his previous visa application. The visa applicant said that this denial was made, as he did not want to jeopardise his brother's visa application in relation to his engagement to the review applicant's cousin. Although the Tribunal notes that the movement records held by the Department do not support the review applicant and the visa applicant's brother travelling together in either 1997 and 1999, the fact that they did travel together at some time is confirmed by the couple. The Tribunal attaches greater weight to the evidence of the couple in this regard in so far as they both state that the review applicant and the visa applicant's brother travelled to Vietnam together at some time. Such a conclusion gives some support to the allegations made in the third party letters. Further support to the accuracy of the third party letters*

is that the engagement of the visa applicant's brother to the review applicant's cousin, as alleged in the letters, was confirmed by the visa applicant at his interview with the Department.'

16 After reviewing other factors referred to in the relevant regulations, the Tribunal said that it was required to weigh the evidence which tends to support the conclusion the couple were in a genuine and continuing relationship against the factors which detracted from that conclusion. It considered that the combination of factors tended to indicate that the couple's relationship was not a genuine and continuing one. It summarised the relevant factors as follows:

'76. ...

- *Most importantly, the third party letters which allege that the couple's marriage was fraudulent and which contain personal details of the couple and photographs which tends to indicate that there is some factual basis for the allegation. In the Tribunal's view the review applicant has not adequately responded to these allegations and they are accorded some weight by the Tribunal.*
- *The couple's differing recollection of the dates in relation to the review applicant travelling to Vietnam with the visa applicant's brother.*
- *The couple's differing explanations regarding the signing of the marriage certificate.*
- *The review applicant's submission fails to address the suggestion that she is in a relationship with the visa applicant's brother.*
- *The lack of enquiry or provision of additional evidence from the couple since the hearing before the Tribunal.'*

17 Turning to the third party allegations that the marriage was contrived (in relation to which the Tribunal cited *Dhillon v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 17 ALD 552 at 555) the Tribunal declined to make any such finding. However, it then stated that it was not satisfied, on the evidence available to it that the couple were in a genuine and continuing relationship as at the date of the visa application or at the time of the decision. As a consequence the visa applicant was not the 'spouse' of the review applicant, as defined in reg 1.15A, at the relevant times. Therefore the Tribunal was not satisfied that the visa applicant met the requirements of cl 309.211 at the time of application or continued to meet the requirements of that clause. It therefore affirmed the decision under review.

NON-COMPLIANCE WITH s 359A

18 When the hearing of this application commenced, the first ground of review was one relating to an improper exercise of power. However, during the hearing and with the consent of counsel for the respondent, leave was given to the applicant to substitute a new ground of

review. That ground is that the decision of the Tribunal was such that it was in jurisdictional error when it did not comply with the requirements placed on it by s 359A of the Act. This was particularised by reference to the respondent's letter dated 10 June 2003 to the applicant and the extent to which it particularised the contents of the two letters and provided details of the photographs.

19 As a consequence of that amendment to the application, opportunity was given to the parties to make written submissions.

20 The applicant submits and repeats in reply that the notification to her did not adequately or accurately particularise the letters. This is supported by submissions that it is not clear who is in any of the photographs and, even if they were of both brothers, why the Tribunal could conclude that the poses there shown were so affectionate as to support the contentions in the letters.

21 I agree with the submission for the respondent that the correctness of the findings made by the Tribunal about what the material supported is not an issue. It cannot be an issue. The province for the finding of fact lay in the Tribunal and, except in the absence of any evidence, it is not for this Court to remake an assessment of the merits. The weight that the Tribunal put upon this evidence, if properly before it, is not now the subject of re-assessment by this Court.

22 The applicant's claim is therefore properly to be understood as raising only the issue whether the notice to her purportedly in accordance with s 359A of the Act was in fact compliant with the provisions of that section so as to give rise to a jurisdictional error. At all relevant times that section has provided that:

'(1) Subject to subsection (2), the Tribunal must:

- (a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and*
- (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review; and*
- (c) invite the applicant to comment on it.'*

The section was amended by the *Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Act (2001)* (Cth) with effect from 28 June 2001 in relation to provisions concerning the manner in which information and the invitation must be given to the applicant, but no issue arises here in that respect.

23 The particulars given by the Tribunal to the applicant were set out in the letter dated 10 June 2003, the relevant terms of which have been set out above.

24 In my opinion the letter of 10 June 2003 gave to the applicant particulars of the character required to be given by s 359A of the Act. It squarely put to the applicant that the issue on which she was being given the opportunity to make submissions was the genuineness of her spousal relationship. It equally put to her that photographs had been provided in support of these claims showing her in affectionate poses with both brothers. She proceeded, even in the absence of precise knowledge of the photographs, to explain in a letter of 30 June 2003 by her advisers that cultural factors may explain the photographs. She denied the lack of genuineness in her marriage. It is apparent that the applicant fully understood the nature of the matters the subject of the s 359A notice.

25 Additionally it is to be noted that:

- (1) the Tribunal had in September 2002 requested evidence from the applicant that she and the husband were in a genuine and continuing relationship. Documents in response to this invitation were provided and make up a major part of the court book;
- (2) the Tribunal had before it photographs provided by the applicant, including wedding photographs, identifying the applicant and the husband; and
- (3) the Tribunal expressly declined to make a finding that the marriage was contrived as alleged in the letters.

26 Consequently there is no basis for finding that the letter of 10 June 2003 did not comply with the requirements of s 359A of the Act. Nor is there any foundation to find that the requirements of natural justice were not met.

DECISION BASED ON FACT THAT DID NOT EXIST

27 As pleaded in the application, this ground of review sought to contend that there was no evidence or other material to justify the making of the Tribunal's decision because it was

based on the existence of a particular fact which did not exist. It was contended in the particulars that in the delegate's reasons it had been stated that the delegate had based his decision in part upon information from the third party. It was said that this had been incorporated into the reasoning of the Tribunal with its recitation of the above quoted portions of the reasoning of the delegate.

28 It is not apparent why the Tribunal found it necessary to refer to the reasons of the delegate. However, it is clear that in doing so the Tribunal was doing no more than reciting the evidence which was before it in the records made available to it. I reject the contention that the Tribunal, in any way, adopted the reasoning of the delegate. In any event, the ultimate findings of the Tribunal were to a different effect to those reached by the delegate on the issue of the applicant's travel to Vietnam with the visa applicant's brother in 1997.

29 Additionally, there is no reference in the reasons of the delegate to the information from the third parties. When the reasons of the delegate refer to the visa applicant and the applicant giving inconsistent information regarding the inception of their relationship, it is apparent from what is set out in the delegate's reasons that it is not a reference to anything derivative from the two letters.

30 Counsel for the applicant accepted in the course of argument that the ground cannot be sustained and it is apparent that it must be dismissed.

DECISION BASED ON FURTHER FACT WHICH DID NOT EXIST

31 In the third ground of review it is contended that the recited finding by the delegate in par 32 of the Tribunal's reasons concerning the travel to Vietnam was inconsistent with a previous finding of fact made by the Tribunal in par 13.

32 However, neither par 13 nor par 32 contain any findings of fact. These do not commence until par 43 of the Tribunal's reasons. Both par 13 and par 32 are recitations of matters which were before the Tribunal in the evidence before it.

33 Furthermore, the applicant's case has not identified, in any way, that the decision of the Tribunal was based on the fact which is said not to exist. The decision of the Tribunal was based on the matters previously set out above including the matters dealt with in pars 62, 63

and 64 as considered in the list of dot points addressed by the Tribunal in par 76.

34 This ground is also without substance and must be dismissed.

CONCLUSION

35 For these reasons the application for review must be dismissed.

I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Nicholson.

Associate:

Dated: 13 April 2005

Counsel for the Applicant: SB Watters

Solicitor for the Applicant: Tang Lawyers

Counsel for the Respondent: JD Allanson

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 9 September 2004

Date of Judgment: 13 April 2005